# BOOKS AND PERIODICALS.

## I. LEADING LEGAL ARTICLES.

THE PARTNERSHIP AS A LEGAL ENTITY. — A recent contributor to the Central Law Journal has made a valuable contribution to the discussion of this subject. *The Firm as a Legal Person*, by William Hamilton Cowles, 57 Central L. J. 348. Beginning with a short statement to the effect that the merchant world, like the law of the continent of Europe, regards a partnership as a distinct person, Mr. Cowles quotes from a number of cases in England and in the United States passages which state in plain terms that a partnership is an "artificial person," "a distinct entity," "as distinct and palpable an entity in the idea of the law as distinguished from the individuals composing it as is a corporation." A layman, or even a lawyer, not fully acquainted with the subject, might infer from these passages that there is no doubt of the position of the English and American courts. But Mr. Cowles well says that not only is the doctrine that the firm is a legal person denied in other jurisdictions, but that even in the very courts from whose opinions these passages are quoted cases can be found which repudiate the idea that a partnership is an entity. Mr. Cowles then discusses the cases in which contests have arisen between firm creditors and separate creditors as to the distribution of the partnership assets, when these assets were either divided by the partners among themselves without paying firm debts, or were transferred to one of the partners, or to the creditors of one or more of the partners.

The two views taken by the courts are illustrated by the leading cases which, on the one side, find such transactions invalid under the statutes against fraudulent conveyances, or, on the other, uphold the transfer on the theory that a firm creditor's rights against firm property can be worked out only by way of subrogation to the so-called partner's equity to have firm assets applied to the payment of firm debts, from which it is assumed to follow that if the partners have all released or lost this equity, the firm creditors have no standing. If the firm is an entity the first view must prevail, and the test of the application of the statute against fraudulent transfers will be the same as in the case of an individual. Mr. Cowles makes a judicious selection of cases to bring forward and discuss in the text of his article, and cites in the notes a large number of additional decisions. He condemns without reserve "the waiver-of-the-partners'-lien-subrogation-theory" first made prominent, if not invented, by Lord Eldon, and which, in our opinion, has been the greatest stumbling-block in the way of the development of our law of partnership into a system, rational, scientific, and harmonious with the conditions and requirements of the business world.

Mr. Cowles also applies the test of the personality of the firm to the cases involving joint debts of the partners which are not firm debts, and shows that in the United States the courts have rightly postponed such debts to the claims of the partnership creditors, while the English courts have put creditors of both kinds on the same footing. Mr. Cowles' conclusion is in these words: "The purpose in thus discussing the situation is not simply to show how unsatisfactory it is; nor to urge that the only remedy is to turn to the legislature and to codify this portion of the law, as England did in her partnership act of 1870; nor to urge that the courts should remedy it by judicial legislation; but to show that they have already done the legislating and that everything will clear up instantly if they will just admit it. Let them appropriate the word firm exclusively to indicate the collective artificial person; let them banish the word joint from the vocabulary of partnership; let them cease reiterating that the common law does not recognize the firm as a person, simply because that was true two hundred years ago, and, in spots, twenty-five years ago; and let them frankly

put these so-called subrogation cases on the shelf as relics of a past stage of the law."

We agree that while the law of partnership in the United States is in its present state of flux it would be a great mistake to attempt to codify it in the usual fashion, since that would produce a result even worse than the "crystallized chaos" of the English partnership act — worse because we have not only copied most of England's false conceptions as to the nature of the partnership relation, but also because of the muddling effect of the view of partnership real estate which is taken by the courts of the United States.

But we are not optimistic as to the probability of a general and open judicial recognition of the firm as a legal person within any reasonable time. It has taken over two hundred years to bring the courts to an occasional, hesitating and timorous, partial admission that the firm is an entity, an admission which from lack of courage they hasten to retract or qualify the next time the question comes before them. Mr. Cowles refers to the Supreme Judicial Court of Massachusetts as a court "specially strong in theoretical knowledge." That court has recently held that the title to the personal property of a partnership is not in the individual members. *Pratt* v. *McGuinness*, 173 Mass. 170. But the court shied at the word entity and said that the title is in the firm "as an entirety," which must mean the same thing, unless the court intended to create a tenure unknown to the common law, viz., an estate by entireties in personal property in analogy to estates by entireties in land granted to husband and wife. But the court could not have meant this, for the incidents of an estate by entirety are radically different from those of partnership tenure. It was this very court so "strong in theoretical knowledge," which perpetrated such decisions as *Howe* v. *Lawrence*, 9 Cush. 553, and *Bush* v. *Clark*, 127 Mass. 111. And the archaic doctrine of partnership as to third persons, when there is neither intent to form a partnership nor estoppel, seems to be still law in Massachusetts. See *Fitch* v. *Hamilton*, 13 Gray 468; *Pratt* v. *Langdon*, 97 Mass. 97, 100; *Brigham* v. *Clark*, 100 Mass. 130; *Potter* v. *Appleton*, 114 Mass. 114.

We have, however, no doubt that, unless arrested by unwise codification, the mercantile view of the nature of a partnership will eventually be adopted by all courts. In the meantime such articles as Mr. Cowles', and the assistance of like-minded lawyers, will be welcome aids to the opposition to the codification of this unripe branch of the law, and, if that cannot be averted, to an effort to make the codifying act a reformation and not a petrifaction. J. D. B.

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BURDEN OF PROOF OF JUSTIFICATION. — The degree of proof required for a conviction for crime forms the subject of a recent reported address. *The Doctrine of Reasonable Doubt*, by J. S. Burger, 11 Am. Lawyer, 440 (Oct. 1903). The author's conclusions are, in the main, sound, but in one respect a better discrimination would at least have promoted clearness, and might have avoided what is believed to be an error. After examining the cases Mr. Burger decides that all the defenses which are set up by the defendant in a criminal proceeding under a plea of not guilty ought to be disproved by the prosecution beyond a reasonable doubt; and he classes together for this purpose insanity, *alibi*, self-defense, and absence of malice in murder. It is submitted that in so doing he fails to distinguish between negative and affirmative defenses.

Clearly the rule laid down is correct as to those defenses which are by nature negative; *e.g. alibi*, which is merely an argumentative denial of the *corpus delicti*; *Commonwealth* v. *Choate*, 105 Mass. 451; or insanity, which, by the better view at least, is of importance as disproving a necessary element in crime, the criminal intent. *People* v. *Egnor*, 67 N. E. Rep. 906 (N. Y.); *Davis* v. *United States*, 160 U. S. 469. *Contra*, *State* v. *Lawrence*, 57 Me. 574. It seems equally clear, however, that defenses by nature affirmative must be established by the defendant by a preponderance of evidence. This is undoubted, for example, where the plea is former jeopardy or pardon. *Commonwealth* v. *Daley*,